No. 93340

IN THE
MISSOURI SUPREME COURT

AMY STRAUSER,

Relator,

v.

HON. SANDY MARTINEZ,

Respondent.

Petition for Writ of Prohibition to the Supreme Court of Missouri
from the Circuit Court of the Washington County, Missouri
Twenty-Fourth Judicial Circuit, Division 1
The Honorable Sandy Martinez, Judge

RELATOR'S STATEMENT, BRIEF, AND ARGUMENT

Respectfully submitted,

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Jurisdictional Statement

In the Circuit Court of Washington County, Cause No. 06D-CR00600-01, Relator pled guilty to one count of Theft/Stealing. Respondent suspended imposition of sentence and placed Relator on five years of probation on June 4, 2007. 9. On February 4, 2013, Respondent ordered Relator to apply for the services of the Public Defender, ordered the Public Defender to represent Relator, and set Relator's case for a probation violation hearing on March 4, 2013.

Relator filed a writ with the Court of Appeals Eastern District, which was denied on April 3, 2013. Relator then filed a writ with this Court on April 30, 2013. Jurisdiction lies in the Supreme Court of Missouri. Mo. Const., Art. V, Sec. 5; Rule 97.01.

Statement of Facts

On June 4, 2007, Relator pled guilty to one count of the Class C Felony of Theft/Stealing. Respondent suspended imposition of sentence and placed Relator on supervised probation for five years. (Appendix, p. A6) On August 22, 2007, the State filed a Motion to Revoke and Suspend Probation; Respondent scheduled a probation violation hearing for September 10, 2007. Relator's probation was not suspended. (Appendix, p. A7)

On September 10, 2007, Relator appeared in person without counsel. Respondent ordered Relator to pay $100 toward her restitution each month and ordered her to appear on October 1, 2007. (Appendix, p. A7) Between October 1, 2007 and May 3, 2010, Relator appeared before Respondent on sixteen occasions

for "case review", each time paying toward her restitution and each time without counsel. (Appendix, p. A7-A10) On July 12, 2010, Relator appeared before Respondent, paid toward her restitution, and was ordered by Respondent to appear and pay on October 4, 2010. While the docket reflects Relator appeared with counsel (Assistant Public Defender Charles Banks), there was no application made by Relator for representation by the Public Defender nor was an entry of appearance filed by the Public Defender's Office. (Appendix, p. A10)

From October 4, 2010, to August 1, 2011, Relator appeared before Respondent for "case review" eleven times, each time making a payment and each time without counsel. (Appendix, p. A10-A12) On September 12, 2011, Relator appeared before Respondent without counsel. Respondent suspended Relator's probation and ordered her to appear and pay on October 3, 2011. (Appendix, p. A12) Between October 3, 2011, and January 7, 2013, Relator appeared before Respondent an additional fifteen times for "case review", each time making a payment and each time without counsel. (Appendix, p. A12-A14)

On February 4, 2013, Respondent ordered Relator to apply for the services of the Public Defender, ordered the Public Defender to represent Relator, and set Relator's case for a probation violation hearing on March 4, 2013. (Appendix, p. A15) Relator filed a writ with the Court of Appeals Eastern District, which was denied on April 3, 2013. (Appendix, p. A16)

Point Relied On – I

The trial court erred in setting Relator's case for a probation revocation hearing, because Respondent no longer has jurisdiction over Relator, in that Relator's probation ended by operation of law on June 4, 2012, and Respondent should have either set the case for a probation violation hearing within the time allowed by law or discharged Relator. The court's error deprived Relator of her right to due process of law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution, and Article I, Section 10 of the Missouri Constitution.

Cline v. Teasdale, 142 S.W.3d 215 (Mo.App.2004)

State ex rel. Breeding v. Seay, 244 S.W.3d 791 (Mo.App. S.D.,2008)

State ex rel. Whittenhall v. Conklin, 294 S.W.3d 106 (Mo.App. S.D.2009)

State v. Roark, 877 S.W. 2d 678 (Mo. App. S.D. 1994)

Missouri Revised Statute Section 559.036 (2012)

Argument - I

Respondent does not have jurisdiction over Relator because suspension of Relator's probation does not extend the period of Relator's probation.

Respondent may argue that she tolled Relator's probation by suspending it on September 12, 2011, and that, as a result, Relator's probation did not end on June 4, 2012. Nothing in section 559.036 RSMo authorizes this. Further, this argument has been made in other cases and has been rejected, most recently in

Saunders v. Bowersox, 179 S.W.3d 288, 292 (Mo. App. S.D. 2005)(citing *State ex rel. Limback v. Gum*, 895 S.W.2d 663, 665 (Mo. App. W.D. 1995)).

Argument - II

Respondent has lost jurisdiction over Relator because neither Respondent nor the State made every reasonable effort to conduct the hearing prior to the expiration of probation or at any time thereafter that was reasonably necessary to conduct the hearing.

Normally, the Circuit Court's jurisdictional authority to revoke probation ends when the probationary period expires. *Stelljes v. State*, 72 S.W. 3d 196 (Mo.App.2002). Section 559.036 RSMo[1] provides the only exception that allows a trial court to extend its statutory authority and revoke probation after its expiration date. Section 559.036.8[2] states that:

> …the power of the court to revoke probation shall extend for the duration of the term of probation designated by the court and for any further period which is reasonably necessary for the adjudication of matters arising before its expiration, provided that (1)

[1] All statutory references are from RSMo Supp. 2012.

[2] Section 559.036 RSMo has been amended so that what was once subsection 6 is now subsection 8. Thus, many of the cases cited in this petition refer to section 559.036.6 when the present statute is 559.036.8.

> some affirmative manifestation of an intent to conduct a revocation hearing occurs prior to the expiration of the period and (2) that every reasonable effort is made to notify the probationer and to conduct the hearing prior to the expiration of the period.

Section 559.036.8 is "complied with when, prior to the expiration of probation, some manifestation of intent to revoke is established and there is no unreasonable delay in conducting the revocation hearing." *State ex rel. Whittenhall v. Conklin*, 294 S.W.3d 106, 110 (Mo.App. S.D.2009). In Relator's case, neither of the requirements was met to extend the Court's statutory authority to revoke Relator's probation.

While there is no statutory definition of what is required to manifest an intent to revoke probation, Courts have held that setting a hearing on the alleged probation violations is sufficient, as well as the State filing a Motion to Revoke probation. *See State v. Roark*, 877 S.W. 2d 678 (Mo. App. S.D. 1994) and *State, ex rel. Breeding v. Seay*, 244 S.W.3d 791 (Mo.App. S.D., 2008).

Assuming, *arguendo*, the state and Respondent have met the first requirement of 559.036.8, they had abandoned that intent to revoke Relator's probation for over four years while Relator appeared repeatedly before Respondent. In fact, Relator was not directed to obtain counsel until nine months after her probation had expired. There was an unreasonable delay in conducting

the hearing on the alleged violations. A probationer has the right to a "timely and final resolution of his probation." *Cline v. Teasdale*, 142 S.W.3d 215, 223 (Mo.App.2004). See also *State ex rel. Brown v. Combs*, 994 S.W.2d 69 (Mo.App. W.D., 1999) (finding a delay of more than one year unreasonable); *Williams v. State*, 927 S.W.2d 903 (Mo.App. 1996); and *Wesbecher v. State*, 863 S.W.2d 2 (Mo.App. 1993). Further, the Court has previously said that "no unreasonable delay should occur in affording the probationer a hearing." *State, ex rel. Breeding v. Seay*, 244 S.W.3d at 795 (quoting *State ex rel. Carlton v. Haynes*, 552 S.W.2d 710, 714 (Mo. banc 1977)).

Relator acknowledges that she bears the burden of showing that "the trial court did not make every reasonable effort to conduct the revocation hearing prior to expiration of the period of probation." *State v. Roark*, 877 S.W. 2d at 680. However, she respectfully submits that she has met this burden. First, Relator recognizes that Respondent suspended her probation prior to its expiration, and set a hearing within the probationary period. However, that hearing was never held and Relator's case languished in "payment review" status for nearly the entire duration of her probation. Finally, Relator was not directed to obtain counsel – a sign that Respondent even arguably intended to revoke her probation -- until nine months after her probation had expired.

Relator expects Respondent will argue that a delay of over four years is reasonable because Relator never demanded a hearing be held. That Relator did not demand a hearing – which would likely result in her facing a felony conviction

and a prison sentence – does not cure Respondent's lack of authority over Relator's case a year after the expiration of her probation. Respondent had the authority to schedule *and conduct* a hearing at any point prior to June 4, 2012. For whatever reason, Respondent abandoned any intent to revoke Relator's probation, never even ordering her to obtain counsel prior to the expiration of her probation. Respondent did not evince an intent to revoke Relator's probation on any of Relator's numerous appearances in court since August 22, 2007. In fact, Respondent's renewed intent to revoke Relator's probation came over four years later. Moreover, while Relator has the burden of showing that the trial court has not made reasonable efforts to hold the probation violation hearing before probation expires, a plain reading of section 559.036.8 clearly shows that either the state or Respondent herself has the burden to ensure that a hearing is conducted before the expiration of the probationary period.

Respondent has argued that Relator fails to meet the burden required in *Petree v. State*, 190 S.W.3d 641 (Mo.App. W.D. 2006), a case in which the delay between the expiration of the probation and the probation revocation hearing was less than six months, in that Relator has not shown that she was ready and willing to proceed at an earlier date. However, this case is more analogous to *State ex. rel. Breeding v. Seay*, 244 S.W.3d 791 (Mo.App. S.D., 2008), a case which, incidentally, cites *Petree*. *Id.* at 796 FN4. In *Breeding*, the Court dealt with facts similar to those here: the State filed a motion to revoke the defendant's probation for failure to pay restitution and the case was passed repeatedly for two years for

"case review" and "payment review". *Id.* at 792-793[3]. Relator contends that *Petree* is not controlling nor dispositive in this case as *Breeding* is more factually analogous, more recent, and the Court there made no mention of any requirement that the defendant be required to announce his or her readiness for a hearing. Finally, there is no indication in the record in this case that *anyone* – including the

[3] The Court noted the following docket entries in the case, which are remarkably similar to those in the present case: "A revocation hearing was set for September 12, 2005. At that time Relator appeared with counsel and the matter was re-scheduled '[b]y agreement' for a hearing on December 8, 2005…On December 8, 2005, Relator and his counsel again appeared and the matter was re-scheduled for February 14, 2006, '[a]t request of [the] State ... there being no objections.' On February 14, 2006, the parties once more appeared and Relator was 'ordered to re-appear on April 13, 2006 ... to review payments on restitution.' On April 13, 2006, Relator 'appear[ed] in person pro se' and the matter was 'passed to June 2, 2006, ... to review costs.'…Then the record reflects that on June 2, 2006, Relator appeared in person with counsel and the matter was 'passed to July 12, 2006 ... to review payments on probation. Probation ordered suspended.'… On July 12, 2006, the docket sheet reveals Relator appeared with counsel and the matter was 'passed to July 14, 2006 ... to review payments on balance and restitution.' The docket sheet then reflects an entry dated July 13, 2006, which merely recites: 'Case Review Scheduled.'

State or Respondent – demanded a hearing over any objections. The record is devoid of any request for a continuance by Relator. (Appendix, p. A4-A14)

Argument - III

That Respondent suspended imposition of sentence, rather than suspending the execution of a given sentence, does not give Respondent unlimited authority to impose sentence at any time, even after the expiration of probation. In fact, even if Respondent were able to proceed in this matter, she would be statutorily barred from imposing a sentence under Revised Statute 559.036 (2012).

Respondent has argued that expiration of probation does not limit the Court's statutory authority to impose a sentence in an SIS case because an SIS without probation is an authorized disposition, and that an SIS is therefore distinguishable from an SES in this respect. Respondent relies primarily on the assertion that this case is analogous to *State ex rel. Connett v. Dickerson*, 833 S.W.2d 471 (Mo. App. S.D. 1992). There, the trial court had suspended imposition of sentence and, later, the defendant admitted to violating his probation. *Id.* at 472. The issue was whether the trial court had continued the original term of probation or had ordered a new term of probation. *Id.* The Court found that the trial court had in effect ordered a new term of probation, and therefore continued to have jurisdiction over the defendant. Here, on the other hand, Relator has never admitted to violating her probation, nor has any hearing been held. Her probation – though a motion to revoke was filed on August 22,

2007 (Appendix, p. A7) and the probation was suspended on September 12, 2011 (Appendix, p. A12), has never been revoked. This case is not analogous to *Connett*.

Respondent contends that an SIS is a "hybrid in the law," *State ex rel. Peach v. Tillman*, 615 S.W.2d 514, 517 (Mo.App. E.D. 1981), a "matter of 'grace, favor and forebearance," *Id.* quoting *Pagano v. Bechly*, 232 N.W. 798, 800 (1930), and that only when the recipient of a suspended imposition of sentence has complied with the terms of her probation may the court discharge her from the jurisdiction of the court. *Peach* at 518. Respondent mischaracterizes Relator's argument to be "the expiration of probation automatically discharges her from probation." Relator argues simply this: when Respondent placed Relator on a five-year term of probation, the rules for revocation under Section 559.036 apply.

In fact, even if Respondent were to proceed with a probation revocation hearing in this matter, she would not have statutory authority to impose a sentence. On August 28, 2012, Missouri Revised Statute Section 559.036, which controls probation revocation proceedings, was revised. It now reads as follows:

> 3. If the defendant violates a condition of probation at any time prior to the expiration or termination of the probation term, the court may continue him on the existing conditions, with or without modifying or enlarging the conditions or extending the term.
>
> 4. (1) If a continuation, modification, enlargement or extension is not appropriate under this section, the court *shall* order placement of the

> offender in one of the department of corrections' one hundred twenty-day programs so long as:
>
> (a) The underlying offense for the probation is a class C or D felony or an offense listed in chapter 195…
>
> (b) The probation violation is not the result of the defendant being an absconder or being found guilty of, pleading guilty to, or being arrested on suspicion of any felony, misdemeanor, or infraction. For purposes of this subsection, "absconder" shall mean an offender under supervision who has left such offender's place of residency without the permission of the offender's supervising officer for the purpose of avoiding supervision;
>
> (c) The defendant has not violated any conditions of probation involving the possession or use of weapons, or a stay-away condition prohibiting the defendant from contacting a certain individual; and
>
> (d) The defendant has not already been placed in one of the programs by the court for the same underlying offense or during the same probation term. *Emphasis added.*

This provision of Section 559.036.4 is colloquially referred to as the Court Ordered Detention Sanction (CODS) program. Should Respondent proceed with a probation violation hearing and find a violation, Relator would qualify for CODS: the offenses she is on probation for are under Chapter 195; the only alleged

violation of probation is for payment of her court costs; and she has not previously been placed in one of the referenced programs for any of these cases.

Section 559.036.4(3) (2012) additionally provides:

> …once the defendant has successfully completed the program under this subsection, the court shall release the defendant to continue to serve the term of probation, which shall not be modified, enlarged, or extended based on the same incident of violation.

This means Respondent would, *at most*, have authority to place Respondent in the CODS program. Should Relator complete that program, Respondent would be required to release her to continue to serve her term of probation, a term of probation which a year ago.

Argument - IV

Respondent's argument that Relator is not entitled to equitable relief where she seeks to benefit from her own "misconduct" is without merit. No objections were ever lodged by the State or Respondent to any continuances. Respondent – despite having the authority – granted every continuance and never set the matter for hearing within the time allowed by law.

Finally, Respondent has argued that Relator is not entitled to equitable relief where she seeks to benefit from her own "misconduct." Relator has appeared as directed by Respondent over the course of several years, paying on her restitution as ordered by Respondent. She has had no other reports of probation violations other than payment on her restitution. Furthermore, any

"misconduct" by defendant does not negate the jurisdictional issues presented in this case.

Conclusion

WHEREFORE, based on his argument in Point I of her brief, Relator requests that this Court grant the writ of prohibition or, in the alternative, the writ of mandamus, requested in this cause, prohibiting Respondent from proceeding with a probation violation hearing in this case and ordering Respondent to discharge Relator.

Respectfully submitted,

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Certificate of Service and Compliance

Pursuant to Missouri Supreme Court Rule 84.06(g), I hereby certify that on this 5th day of July, 2013, a true and correct copy of the foregoing brief and the attached appendix were served via the efiling system to the Office of the Attorney General, P. O. Box 899, Jefferson City, Missouri 65101, and by e-mail to Mr. Gregory Barnes, Assistant Attorney General, at greg.barnes@ago.mo.gov and the Honorable Sandy Martinez at sandy.martinez@courts.mo.gov. In addition, pursuant to Missouri Supreme Court Rule 84.06(c), I hereby certify that this brief includes the information required by Rule 55.03. This brief was prepared with Microsoft Word for Windows, uses Times New Roman 13 point font, and does not exceed the greater of 15,500 words, 1,100 lines, or fifty pages. The word-processing software identified that this brief contains 3,246 words. Finally, I hereby certify that the electronic copies of this brief have been scanned for viruses and found virus-free.

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